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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 08-1295

RECEIVED

JAN 28 2010

JOSEPH J. SCHNEIDER
U.S. Magistrate Judge

In Regard to the Matter of:

Bayside State Prison
Litigation

OPINION/REPORT
OF THE
SPECIAL MASTER

BARRY SWEETEN

-VS-

WILLIAM H. FAUVER, et al,
Defendants.

* * * *

FRIDAY, DECEMBER 11, 2009

* * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

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5 Transcript of proceedings in the above
6 matter taken by Theresa O. Mastroianni, Certified
7 Court Reporter, license number 30X100085700, and
8 Notary Public of the State of New Jersey at the
9 United States District Court House, One Gerry Plaza,
10 Camden, New Jersey, 08102, commencing at 11:33 AM.
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1 JUDGE BISSELL: We are reopening
2 proceedings in the matter of Barry Sweeten versus
3 William Fauver, et al. Docket number 08-1295 for the
4 purpose of stating the Special Master's determination
5 in that matter.

6 This opinion/report is being issued
7 pursuant to the directives of the Order of Reference
8 to a Special Master and the Special Master's
9 Agreement and the guiding principles of law which
10 underlie this decision to be applied to the facts
11 upon which it is based as set forth in the jury
12 instructions in the Walker and Mejias jury charges to
13 the extent applicable to the allegations of Mr.
14 Sweeten.

15 As finalized after review under Local
16 Civil Rule 52.1, this transcript will constitute the
17 written report required under paragraph seven of the
18 Order of Reference to a Special Master.

19 Mr. Sweeten was in D Tent at the time
20 that it was searched on August 14, 1997. He had
21 arrived in D Tent in late July of that year.

22 He testified as to certain incidents
23 that occurred to him regarding alleged assaults by
24 SOG officers during the course of his and his fellow
25 inmates' extraction from D Tent for purposes of

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1 searches. In fact, at some point relatively soon
2 after the events which he alleges took place, he even
3 prepared a map of the activities of the officers in
4 the tent on the date in question, including
5 references to locations where he was assaulted in the
6 presence of other inmates in the tent and others.
7 This diagram was introduced as P-160 in evidence in
8 the case.

9 His description of the assaults
10 perpetrated upon him, varying slightly at various
11 segments of his testimony, I think can be put
12 together from certain excerpts of his testimony which
13 I will read into the record at this time.

14 He testified on January 20th, 2009 and
15 the first of these entries begins at page 11 and runs
16 from line six through 15. SOG was already there and
17 had issued instructions and the testimony now begins:

18 "Question: And what happened to you,
19 sir?

20 "Answer: When they got around to my
21 area, I was told to get up off the floor and I
22 started getting dressed. That's when I received the
23 first blow over onto the bed.

24 "Question: What kind of a blow was it?

25 "Answer: Just like a push and then

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1 forward motion onto the bed. Then I was kicked in
2 the ribs. And then two more times on the way going
3 out the door. A total of three times."

4 He testifies further on the subject of
5 these assaults now with reference to P-160, his
6 diagram.

7 "Question: Down at the bottom on the
8 right you have a K, location where --

9 "Answer: Where I was last kicked.

10 "Question: Where is that on the actual
11 diagram?

12 "Answer: Right near the door entrance
13 where the steps are to go down and come in. And I
14 was handcuffed while I was kicked in the back and
15 almost fell flat on my face as I was going out the
16 door.

17 "Question: Now, further up the top you
18 have on the top left under D Tent --

19 "Answer: Yes.

20 "Question: -- position where I was
21 first kicked?

22 "Answer: Yes, that's right next to my
23 bed area.

24 "Question: Is that the kick you
25 described in the back?

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1 "Answer: Yes.

2 "Question: I'm trying to get the
3 chronology down. You got pushed onto your bed, and
4 then you got kicked in the back?

5 "Answer: Yes."

6 At that point he then talks about the
7 extent of the pain that was inflicted. There was
8 some pain inflicted from the assault itself. He said
9 that became exacerbated as a result of having to sit
10 in the gym later, but that as well he had a
11 pre-existing back pain condition from warehouse work
12 that he used to do involving a lot of heavy lifting.

13 While we're on this subject at this
14 point, because I am going to make a determination
15 that he has made out a cause of action here, I will
16 tell you that the injuries which were predominantly
17 to his back as a result of the assaults perpetrated
18 upon him aggravated a pre-existing condition. But
19 over time this assault was not a significant
20 contributor to any long-lasting effects. Any
21 long-lasting effects are from the pre-existing
22 condition itself. However, there is no doubt that
23 pain was inflicted at the time and that it
24 exacerbated an ongoing back pain problem. It
25 eventually abated with the initial ongoing condition

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1 then continuing.

2 Turning now to the alleged assaults as
3 they took place, page 21 beginning at line seven,
4 that testimony continues.

5 "Question: Sir, you were describing
6 the assault. You got kicked in the back. Were you
7 on the ground then?

8 "Answer: Yes, I was.

9 "Question: What happened next?

10 "Answer: That was when they told me to
11 get up off the ground and get dressed.

12 "Question: Did you do that?

13 "Answer: Yes, I did everything they
14 told me to do. There was no reason for them to lay
15 hands upon me.

16 "Question: Did there come a time when
17 they stepped on your neck?

18 "Answer: To hold me down until they
19 were ready to put the handcuffs on me.

20 "Question: Where was that?

21 "Answer: Right alongside the bed,
22 parallel to it.

23 "Question: Can you describe what they
24 did?

25 "Answer: He just basically held me

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1 down. And I couldn't say nothing. And they just put
2 the handcuffs and they said, get up. And that's when
3 I received the second and third blow going out the
4 door, about in the middle and right near the door.

5 "Question: You said the second and
6 third blow, were they punches or kicks?

7 "Answer: Kicks, because when I took my
8 T-Shirt off, I had black boot marks on my T-shirt.

9 "Question: You didn't describe, I
10 don't think, the standing on your neck. Can you
11 describe that particularly --

12 "Answer: Basically it was like he had
13 his foot as a wedge holding it down just so I
14 wouldn't move. That was basically it. Wasn't like a
15 heavy blow or a kick. The one blow or kick was just
16 to the rib. And I had a small bruise from that."

17 So that's a description of the events
18 that occurred to him.

19 Mr. Sweeten had some indications in his
20 own mind that not only the SOG units were involved,
21 but also Bayside officers in this assault, Bayside
22 officers being dressed similarly. I find, however,
23 that that is not the fact. There is nothing here to
24 indicate that standard operating procedures were not
25 employed in which SOG officers alone entered the

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1 units involved, including tents, to perform the
2 extraction of the inmates involved.

3 While there was defense testimony that
4 could lay some doubt as to whether SOG conducted
5 themselves in this fashion on this occasion, I find
6 that there is no evidence that is compelling that
7 would lead me to any conclusion other than the fact
8 that for reasons merely of exerting authority and
9 moving Mr. Sweeten out of his bunk area through the
10 unit and out for transport to the gym that these
11 events did occur. Frankly, I find them totally
12 excessive and unnecessary for the purpose of the
13 extrication of this inmate. He was a new arrival on
14 the premises, as were almost all occupants of the
15 tents, with no indication that this was a person who
16 would be particularly difficult or violent or
17 resisting or one who would need, shall we say, any
18 type of physical discipline for the purpose of
19 exercising authority.

20 I find, therefore, that under the
21 definitions supplied in the governing jury
22 instructions here, that there was excessive force
23 employed and cruel and unusual punishment inflicted
24 upon Mr. Sweeten.

25 In reaching this decision, I am not

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1 unmindful of testimony by Mr. Sweeten in the course
2 of his depositions and elsewhere, also as revealed in
3 Exhibit P-170 which was the Internal Affairs
4 Investigator's Report of this incident which is
5 contradictory and, in fact, in some cases truly
6 inaccurate, although under oath. I've considered
7 this in connection with assessing the credibility of
8 Mr. Sweden. And I have concluded that although these
9 exposures, mostly in the course of cross-examination,
10 did have an impact on his credibility, as indeed they
11 should have, that impact was not so substantial as to
12 lead the undersigned to a conclusion that Mr. Sweeten
13 did not testify accurately with regard to the events
14 that happened to him in D Tent. Let me go through
15 those for a moment just so the record is clear.

16 In his deposition, for instance, he
17 denied that he had any prior back injury that was
18 work related. However, prior to August of 1997 he
19 had advised medical personnel at Bayside State Prison
20 of a chronic back pain and condition.

21 Secondly, he denied that he had any
22 psychiatric problems before his arrival at Bayside
23 Prison. And that was also in his deposition. But at
24 trial he admitted that he had had such psychiatric
25 problems, including, as best I can recall, a bipolar

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1 condition.

2 In his deposition he had denied any
3 prior suicide attempts before his arrival at Bayside,
4 although he acknowledged that a suicide attempt
5 ensued at Bayside several months after the lockdown.
6 However, on cross-examination it was revealed and he
7 had to acknowledge, this is during the trial, that in
8 1996 he had made a suicide attempt at the Gloucester
9 County Jail. He had to make that admission either at
10 his trial or his deposition after having been
11 confronted with that event.

12 Finally, when confronted with charges
13 that were brought against him for altering medical
14 forms, in order, among other things, to secure the
15 privileges of a lower bunk with a double mattress, he
16 denied guilt regarding the altering of those forms
17 and continued to do so here before this Special
18 Master. However, in Exhibit P-170 a report of his
19 interview with Internal Affairs reveals that after
20 initially denying it, he eventually admitted that he
21 had altered those forms in an incident that involved
22 mail coming back and forth from the prison between
23 him and his mother.

24 So these were all events that did,
25 indeed, have an impact upon Mr. Sweeten's

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1 credibility. However, I find that his precise
2 testimony with regard to the events that transpired
3 before me, without any efforts to embellish, enhance
4 or exaggerate either the punishment inflicted or its
5 results, has that ring of truth that leads me to
6 conclude that he has established his claim here.

7 There was, indeed, excessive,
8 unnecessary and sadistic force imposed upon Mr.
9 Sweeten within the contemplation of the jury
10 instructions in Walker and Mejias that apply.
11 However, in light of the fact that the striking of
12 Mr. Sweeten was neither prolonged, repeated, nor
13 particularly severe in its consequences, while
14 actionable for recovery of compensatory damages, I do
15 not find that this assault visited upon him rose to
16 the level of being so egregious as to support a claim
17 for punitive damages, at least against the
18 unidentified officers who were with him and who
19 inflicted the injuries involved.

20 Finally, although not every item of
21 evidence has been discussed in this opinion/report,
22 all evidence presented to the Special Master was
23 reviewed and considered. I do want to add quickly at
24 this point, however, because it will come up in my
25 forthcoming decisions in their own cases, that I

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1 considered also the testimony submitted in support of
2 Mr. Sweeten's case by plaintiffs Andre Jarrells and
3 Robin Lewis who were also occupants of D Tent at the
4 time of this incident. Their testimony, however, is
5 so inherently incredible, as the decisions in those
6 cases will reveal, that I find it lent no support to
7 Mr. Sweeten's case. However, as noted above, he
8 prevailed without it.

9 I find the injury here was actionable.
10 I find that the injury was acute initially, but did
11 not remain a part of Mr. Sweeten's permanent back
12 condition, that being something which preexisted. I
13 note also that the record reveals that there were no
14 substantial restrictions on Mr. Sweeten's activities
15 after the events in question.

16 Accordingly, I recommend in this report
17 that the District Court enter an award of
18 compensatory damages in the amount of \$3,500 in
19 Mr. Sweeten's favor.
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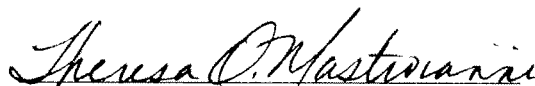
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C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.



Theresa O. Mastroianni, C.S.R.
Notary Public, State of New Jersey
My Commission Expires May 5, 2010
Certificate No. XI0857
Date: December 15, 2009

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